United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

6-12-64
(1)

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 18443

963

ODELL PARHAM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court
for the District of Columbia

De LONG HARRIS,

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Counsel for Appellant

QUESTIONS PRESENTED

I.

Whether in a case where there are multiple minor deficiencies in the charge, no objection thereto by counsel for accused who objects only twice during entire trial, will the errors in the aggregate so affect substantial justice as to warrant notice thereof by this Court?

II.

Whether or not in a case where evidence was such that reasonable men might arrive at different conclusions as to whether or not the intent of accused was to "TAKE" complainant's property, was the failure of the trial Court to define the "taking" element in robbery in its charge plain error?

III.

In a case where the evidence might lead the minds of reasonable men to differ as to the intent of an accused whether or not a trial Court's instruction to a jury that "intent" may be presumed is plain error?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 18443

ODELL PARHAM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 United States Code 1291 and Rule 37 of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

Odell Parham, a young man who held a position as a recreation counselor for playgrounds under the District of Columbia Government, who had held that position for a number of years, who had never before in life been arrested for, charged with, tried upon or convicted of any crime whatsoever and whose record was without a single blemish of any sort, was tried in the District Court upon a one-count indictment charging the robbery of one, Margaret Davis, of a wallet, money, and certain minor items of personal property on July 16, 1963. (JA 1). Mr. Parham was represented by retained counsel of his choice, Walter Clarke, Esquire, a member of the bar of the District of Columbia, who filed no pre-trial motions of any sort on behalf of Parham.

At the trial before the Honorable Judge Richmond B. Keech and a jury in the District Court, the United States called as its first and principal witness, Margaret Davis. (JA 2). Mrs. Davis testified that about 11:15 p.m., July 16, 1963 while returning from work at her job as a waitress, she parked her car in the parking lot behind the apartment building where she lived; she saw a car occupied by several people. (JA 6). She said that her assailant came from that car. (JA 6). As she walked toward her apartment, she noticed a man, walking at times in front of her and at times behind her; that this man grabbed and choked her with both hands, wrestled her to the ground, and attempted to remove her undergarments. (JA 4). She then hit her assailant "in his private and he jumped up and ran." (JA 4). After Mrs. Davis had concluded this full and detailed description of the occurrence which had not included anything indicating or tending to indicate that she had been robbed, or that her assailant had taken from her any property (JA 4), the prosecutor then asked the very "leading question," "Where was your purse?" Mrs. Davis then, almost as an afterthought testified, "He had it and was gone. He was running up the hill." (JA 4).

According to her testimony, Mrs. Davis never clearly saw her assailant prior to the attack and, even then, she viewed the man during the attack in semi-darkness. (JA 9). When identifying the clothing of her attacker, she did so positively but was forced to admit that she did not remember exactly when faced with a collar-less shirt exhibited to the Court. She had described her assailant's shirt as one with a collar when she first testified.

More than an hour after the attack, Detective Frank Rinaldo found various items belonging to the complaining witness scattered about the scene of the attack in a fashion indicative of the struggle described by Mrs. Davis (JA 4), as opposed to any indication of a taking away of her property by her attacker. Her apartment was located in a huge development consisting of many buildings.

Neither the testimony of Frank Rinaldo nor the testimony of Special Policeman Earl Mitchell concerning Parham's actions when they questioned him a few hours after the attack, indicated that Parham was a man apparently involved in the crime. Parham had no qualms about turning over his clothing to the Detective nor any hesitation about explaining that the reason for the dirt on his clothes was that he had played ball earlier at his place of employment as a recreation counselor. (JA 10, 11). This, no doubt, is normally expected of those involved in recreation activities. Mitchell did not notice anything about the physical appearance of Parham, i.e., marks or scratches, which would have indicated that he had been in the struggle described. (JA 19).

Defense counsel made no request for instructions of any sort. (JA 23). He made no objection to any portion of the charge as delivered. (JA 23-28). He sought to have nothing added to the charge as set forth. (JA 29). The Court proceeded, without exception from defense counsel, to allude to defendant's interest in the outcome of the case as a caution to the jury's belief in the evidence by Parham in behalf of himself. This was done immediately following the explanation by the Court of the

weight to be given to evidence of good character by the testimony of substantial witnesses offered for Parham, thus leaving the self interest of the defendant and the Court's unwarranted emphasis as the lasting impression in the minds of these lay jurors. (JA 25). An erroneous definition of the intent required to make out the offense of robbery was set forth (JA 27, 28):

> "As to the second element enumerated, that he took the property unlawfully and with the intent to convert it permanently to his own use, intent ordinarily cannot be proved directly because there is no way of fathoming and scrutinizing the operations of the human mind, but intent may be deduced from circumstances and from things done and from things said and a person is presumed to intend the natural and probable consequences of his act."

Finally, the Court failed to define the third and fourth elements of the offense of robbery and, indeed, told the jurors that they had heard the evidence and no further explanation was necessary (JA 28):

> "As to the third element, that he took it from the complainant's person or immediate actual possession, you have heard the evidence and no further explanation is needed.
>
> "As to the fourth element, that the defendant took the property by force or violence, against resistance, no further definition is necessary. It will be for you to determine whether the government has proven this element, also."

The jury found Parham guilty of the offense of robbery as charged. Odell Parham was sentenced to imprisonment for a period of two (2) years to six (6) years.

This appeal followed.

STATUTES INVOLVED

Robbery

District of Columbia Code (1961 ed.), Title 22, Section 2901 provides:

> "Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years."

Attempted Robbery

District of Columbia Code (1961 ed.), Title 22, Section 2902 provides:

> "Whoever attempts to commit robbery, as defined in section 22-2901, by an overt act, shall be imprisoned for not more than three years or be fined not more than five hundred dollars, or both."

Assault With Intent To . . . Rob . . .

District of Columbia Code (1961 ed.), Title 22, Section 501 provides in pertinent part:

> "Every person convicted of any assault with intent . . . to commit robbery, . . . shall be sentenced to imprisonment for not more than fifteen years."

Assault With Intent To Commit Any Other Offense

District of Columbia Code (1961 ed.), Title 22, Section 503 provides as follows:

> "Whoever assaults another with intent to commit any other offense which may be punished by imprisonment in the penitentiary shall be imprisoned not more than five years."

RULE INVOLVED

Federal Rules of Criminal Procedure, Rule 52(b) provides:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF POINTS

I.

The Appellant was prejudiced and did not have a fair trial because, in the aggregate, the Court's charge to the jury was deficient, erroneous, misleading, and improper in minor ways in a great many particulars.

II.

The Appellant was prejudiced and did not receive a fair trial by reason of the fact that the Court failed to define the elements of robbery in proper fashion in its charge to the jury.

III.

The Court prejudiced Appellant by its failure to properly define intent in its charge.

IV.

The Court prejudiced Appellant by its failure to charge upon the subject of lesser and included offenses.

SUMMARY OF ARGUMENT

I.

In the aggregate and in consideration of the whole, this Appellant suffered because of and by reason of the many small deficiencies, inadequacies and errors in the Court's charge to the jury such that he could not be said to have had a fair trial. Moreover, Appellant is handicapped by the fact that he hired a lawyer of his own choice, paid his fee but the lawyer was not helpful to him in many areas where a lawyer's help was most important. The consequence was that although there were many grave and serious errors in the Court's charge to the jury, this Appellant must now demonstrate to this Court that they were plain errors and that they prevented the obtention of substantial justice by Appellant. The errors in the charge were plain and Appellant did not receive substantial justice. Therefore, he asks a reversal of his conviction at the hands of this Court even though his lawyer failed to make proper objection.

II.

In this case the evidence might have been interpreted in several ways with respect to what was the intent of the complainant's assailant. The facts lent themselves to a belief in a theory that the assailant attacked complainant not for the purpose or with the intent to rob but for purposes of a sexual attack. Moreover, there was some evidence which would have supported this theory and, as well, the theory that Appellant did not take any of complainant's property. It was, therefore, doubly important that the Court's charge upon the subject be accurate. Not only was the charge in this regard inaccurate and erroneous, but it flew directly into the face of the prohibitions and admonitions contained in Morissette v. United States because it directed the jury to base its finding of intent upon a presumption in clear violation of the rule announced in Morissette. Morissette v. United States, 342 U.S. 246, 96 L.Ed. 288.

III.

Because the evidence might have been interpreted by reasonable men that there was no taking of complainant's property by her assailant, the Court below failed in its duty to properly define elements of "taking" in a case of robbery in its charge to the jury with the result that Appellant did not receive substantial justice because of this plain error which should be corrected by this Court.

IV.

The Court failed to charge upon lesser offenses necessarily included in a charge of robbery such as assault, attempt to commit robbery and assault with intent to commit robbery. In view of the fact that evidence of a taking was perhaps less than satisfactory, it was plainly an error to fail to charge upon lesser and included offenses and substantial justice requires the reversal of Appellant's conviction even though his lawyer failed to request such an instruction.

ARGUMENT

I.

MULTIPLE ERRORS IN THE CHARGE CONSTITUTED PLAIN ERROR

Although Odell Parham was represented at the trial by counsel of his choice, his representative made only two objections throughout the trial and, indeed, one of these was withdrawn. His lawyer proffered to the Court no prayers for instruction, failed to object to the charge of the Court in any particular and took no exception to the failure of the Court to give proper instruction. We are, therefore, at the outset, concerned with the problem of demonstrating to this Court the existence of plain error which should be recognized in this appeal despite the lack of proper preservation of the record by timely and seasonable objection.

The general rule, if permitted the use of redundancy for emphasis, can be said to be only "generally" true. Moreover, there is no question but that the general rule admits of exception and, as a matter of fact, the exception with which we are here concerned is itself a rule, that is to say, Rule 52(b) of the Federal Rules of Criminal Procedure which employs the rather specific language, "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

This man Parham paid his money for the hire of counsel. The law does not require of him any heavier responsibility where his liberty is at stake.

After charging the jury, ". . . it becomes your duty to give the proper weight to the testimony of each and every witness who has testified in the case," (JA 25), the Court, three paragraphs later, unfairly and unduly emphasized the interest of Parham in the outcome of his own trial when it charged, "You are further instructed that while the defendant is a competent witness to testify in his own behalf, you have the right to take into consideration his interest in the outcome of the case and give to his testimony that weight which you deem it fairly entitled to." (JA 25). There is no doubt but that the first quoted portion of the charge in this regard is an accurate, fair and true statement of the law. The vice is in the second passage which borders upon a violation of the rule announced in Strader v. United States, 72 F.2d 589, 593.[1] If the instruction in this case did not go, "an arrow's flight beyond the permitted bounds of fair and helpful analysis of the evidence or comment upon it," it might lead a jury to believe that the testimony of Parham, a citizen whose prior record was without blemish, was to be regarded with extreme caution. Certainly this is not the law and again the charge operated to prejudice Parham in a way small when considered alone but

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[1] The Strader case is authority for review of error in a charge without proper exception having been made during trial.

which looms large when projected against the screen of the multiple deficiencies in the charge. Nor will society penalize him for his error in choice of counsel.

An examination of case law on the subject reveals that appellate courts generally, and this Court in particular, have used "substantial justice" at once as a measuring rod, as a guideline and a balance scale for the determination as to when and under what circumstances error will be considered, absent an objection. Fortunately for Parham, the rationale of that case law points to a review of error claimed by him in this appeal not only because they are obvious but also because of the policy of this Court to issue to him substantial justice and to all persons in situations similar to his lest the American symbol of fair play become tarnished or lose its lustre.

The charge of the Court in this case left much to be desired in many areas. Pursuit of the many deficiences as individual points of argument would not be a wise course for this appellant, saddled and burdened as he is with the requirement of demonstrating plain errors and lack of substantial justice. However, he must cast his argument upon his principal points against the background of the frailities of the charge considered as a whole. In that connection, Parham points out to the Court in general terms some of the deficiencies of the charge.

Although the Court was not required to do so, much might have been gained by Parham had it instructed the jury that Parham was not bound to prove his innocence even though the Court did state the general rule, "the burden is on the Government to prove a defendant guilty beyond a reasonable doubt and if the Government fails to sustain this burden, then you must find the defendant not guilty," the Court did not elaborate. (JA 24).

II.

DEFINITION OF "INTENT" IN CHARGE VIOLATED SUPREME COURT RULING IN MORISSETTE v. UNITED STATES[1]

The Court charged the jury:

> "AS TO THE SECOND ELEMENT ENUMERATED, THAT HE TOOK THE PROPERTY UNLAWFULLY AND WITH THE INTENT TO CONVERT IT PERMANENTLY TO HIS OWN USE, INTENT ORDINARILY CANNOT BE PROVED DIRECTLY BECAUSE THERE IS NO WAY OF FATHOMING AND SCRUTINIZING THE OPERATIONS OF THE HUMAN MIND, BUT INTENT MAY BE DEDUCED FROM CIRCUMSTANCES AND FROM THINGS DONE AND FROM THINGS SAID AND A PERSON IS PRESUMED TO INTEND THE NATURAL AND PROBABLE CONSEQUENCES OF HIS ACT." (JA 27-28)

When a trial Court in a criminal case instructs that the standard to be used in inferring intent is that a person is presumed to intend the natural and probable consequences of his act, there is nothing more that an appellant can do other than quote the charge and cite Morissette v. United States.[2] This appellant, Parham, will not do more, save that out of an abundance of caution he will cite United States v. Nedley, 255 F.2d 350; United States v. Kemble, 197 F.2d 316, 321; United States v. Cohen, 274 F.2d 296, 297.

In Nedley, supra, the Court cites the law as stated in Morissette, supra:

> " 'It is alike the general rule of law, and the dictate of natural justice, that to constitute guilt there must be not only a wrongful act, but a criminal intention.' "

In Kemble, supra, the Court relies upon Morissette, supra:

1, 2 Morissette v. United States, 342 U.S. 246, 96 L.Ed. 288

> "The analogy presented by the Morissette decision is apt here. Morissette like Kemble did intend to convert. Morissette openly took, crushed and transported the casings. Kemble was open about his taking and appropriation of the whiskey. We conclude that the jury should have been required to find that Kemble possessed a specific intent to steal the whiskey. Not to have so charged the jury was error."

According to the government's evidence in the case below, it might well have been inferred that the assailant of Mrs. Davis had no intention of taking property but, if anything, had the intent to sexually molest her. The fact that during the struggle Mrs. Davis dropped or lost items of personal property cannot alter the situation legally. It was, therefore, of the very greatest importance that the jury be instructed properly upon the subject of intent.

Finally, the Supreme Court in Morissette, supra,proclaims the controlling law:

> "IT FOLLOWS THAT THE TRIAL COURT MAY NOT WITHDRAW OR PREJUDGE THE ISSUE BY INSTRUCTION THAT THE LAW RAISES A PRESUMPTION OF INTENT FROM AN ACT. IT OFTEN IS TEMPTING TO CAST IN TERMS OF A 'PRESUMPTION' A CONCLUSION WHICH A COURT THINKS PROBABLE FROM GIVEN FACTS."

III.

CHARGE NOT DEFINING ELEMENTS OF ROBBERY FAILED TO ACCORD SUBSTANTIAL JUSTICE

Perhaps no more rapid a way of illustrating this manifest, patent, obvious, and outstanding error in the charge of the Court in this case can be suggested than the quotation of a portion of the actual charge itself with reference to the Court's definition of the crime of robbery which was charged in the indictment. At page 28 of the Joint Appendix and at page 179 of the stenographic transcript in this case there is found that portion of the charge complained of in this point:

> "AS TO THE THIRD ELEMENT, THAT HE TOOK IT FROM THE COMPLAINANT'S PERSON OR IMMEDIATE ACTUAL POSSESSION, YOU HAVE HEARD THE EVIDENCE AND NO FURTHER EXPLANATION IS NEEDED. AS TO THE FOURTH ELEMENT, THAT THE DEFENDANT TOOK THE PROPERTY BY FORCE OR VIOLENCE, AGAINST RESISTANCE, NO FURTHER DEFINITION IS NECESSARY. IT WILL BE FOR YOU TO DETERMINE WHETHER THE GOVERNMENT HAS PROVEN THIS ELEMENT, ALSO." (JA 28).

Scarcely is it necessary to quote the law and to cite cases with respect to the above portion of the charge. There is nothing in the law, there is nothing in the practice, there is nothing that has suggested itself to the mind of counsel why the Court, in defining the "third element," charged, "You have heard the evidence and no further explanation is needed." Moreover, by the same token, there was no rational, real, sensible or legal reason whatsoever why the trial Court instructed the jury that the "fourth element" should not be defined because definition was not necessary, nor why it gave the instruction, " . . . no further definition is necessary. It will be for you to determine whether the government has proven this element ALSO."[3] We are here concerned with a consideration of the Court's charge with respect to its attempted means and method of defining the crime of robbery. To the ordinary-minded citizen and to the average layman who is found on an average jury, the charge in this regard might have meant, and probably did mean, many diverse, misleading and incorrect propositions the most damaging of which was that the Court regarded the proof offered by the government as fully sufficient as to the three elements of robbery set forth before the "fourth element" and that it was for the jury to determine whether or not the government had ALSO proven the "fourth element," that is IN ADDITION to its already conceded proof of the first three elements.

In Smith v. United States, 230 F.2d 935, 939, in dealing with a problem of the nature here presented the Court held that it would reverse the conviction because of errors in the charge even though not objected to by defendant below saying:

[3] Emphasis supplied.

> "This was plain error affecting the substantial rights of the defendant Troy Smith. The appellate court may take notice on its own motion of the prejudicial error inherent in these charges. Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288; Schmeller v. United States, 6 Cir., 143 F.2d 544." Smith v. United States, 230 F.2d at 939.

In this case there was much more than a mere formal need for a good sound definition upon the element "TAKING" in robbery. For, as is said elsewhere in this brief, the evidence would have supported the theory that even if defendant assaulted the complainant he did not take away any of her property. A careful examination of the testimony of the complainant would not lead one irresistably to the conclusion that her property was taken, her testimony, in the main, treated of the attempted sexual attack. (JA 3-5).

Proof of a wrongful taking with intention of keeping wrongfully is the very gravamen of the offense of robbery and without it there can be no conviction. United States v. Nedley, 255 F.2d 350, 356. Certainly substantial justice was adversely affected where the Court below failed to define this element. The error was of such gravity and weight as to warrant its notice by this Court in the interest of substantial justice.

Both elements three and four as set forth by the trial Court had to do with "taking." If in fact there had been a taking, there was no very serious question as to whether such taking was from the possession of Mrs. Davis or that such taking was by force and violence. The point is, however, that whether or not there was a taking at all was a question to be decided by the jury. The jury could not arrive at a proper finding in the absence of proper definition of terms. The Court failed to define taking. The Court failed to tell the jury that the accused must have intended to take and carry away the property and to keep it wrongfully. The law in this regard was stated by Judge Prettyman, speaking for this Court in Kenion v. Gill, 155 F.2d 176, 179:

> "It is reversible error for the trial court to fail to define the various crimes involved in the indictment, and to fail to define the elements of each, to the extent necessary to permit the jury to apply the law to the facts. Williams v. United States, 1942, 76 U.S. App. D.C. 299, 131 F.2d 21; Miller v. United States, 10 Cir., 1941, 120 F.2d 968."

Parham's case here is not dissimilar, insofar as the applicable law is concerned, to Morris v. United States, 156 F.2d 525, 527 where it was held:

> "It is our opinion that the trial court committed fatal error in failing to instruct the jury on the statutes and regulations defining and governing the offenses charged against the appellant. No assignment of error was made at the trial covering this claimed error, but we consider it because, as is well stated in Suhay v. United States, 10 Cir., 1938, 95 F.2d 890, 893, '* * * Where life or liberty is involved, an appellate court may notice a serious error which is plainly prejudicial even though it was not called to the attention of the trial court in any form.' In a criminal case, it is always a duty of the court to instruct on all essential questions of law, whether requested or not. See Screws v. United States, 1945, 325 U.S. 91, 107, 65 S.Ct. 1031; 89 L.Ed. 1495; Corson v. United States, 9 Cir., 147 F.2d 437; Kreiner v. United States, 1926, 2 Cir., 11 F.2d 722, certiorari denied 271 U.S. 688, 46 S.Ct. 639, 70 L.Ed. 1152.
>
> "The Court did not define the offense of which the appellant was charged and was being tried, and the jury was given no opportunity of applying the facts to the law. Instead, the judge reserved to himself the duty of applying the law to the facts."

This law is quite applicable to the case at bar. It should not be left to conjecture as to whether or not the jurors really understood that an actual taking was the prime requisite for a finding of guilty upon a charge of robbery. If the jury was not properly instructed as to the definition of the elements of robbery, this Court should reverse Parham's conviction.

IV.

FAILURE TO CHARGE UPON SUBJECT OF LESSER AND INCLUDED OFFENSES WAS PLAIN ERROR

Against the back-drop of the multiple defects and deficiencies of the Court's charge in this case, there was another most prejudicial omission, in that the man was entitled to an instruction or to instructions upon the lesser and included offenses which may have been proven, or upon the subject of which there had been evidence during the trial of the cause. Here again, counsel of Parham's choice failed miserably in his duty to Parham. Parham's counsel neglected, as aforesaid, at any stage of the proceedings to request of the Court any instruction whatsoever, and, of course, at the conclusion of the charge when the Court took pains to inquire for a third time if defense counsel had anything to add, he remained silent. So it is, that Parham stands before this Court without errors in the record having been properly preserved.

In this jurisdiction, as is true in all of the Federal Circuits, it is the law that a defendant is entitled to an instruction upon the lesser and included offense where it is impossible to commit the greater crime without first having committed the lesser. Here are a few examples of cases setting forth this general rule: In Larson v. United States, 296 F.2d 80, 81, we are told:

> "Rule 31(c) of the Federal Rules of Criminal Procedure 18 U.S.C.A., states that '(T)he defendant may be found guilty of an offense necessarily included in the offense charged * * .' To be 'necessarily included' within the meaning of the Rule, the lesser offense must be such that it is impossible to commit the greater without having first committed the lesser. Giles v. United States, (9th Cir.) 144 F.2d 860; James v. United States (9th Cir.) 238 F.2d 681, 16 Alaska 513. And, ' * * * where some of the elements of the crime charged themselves constitute a lesser crime * * *,' and there is evidence to support them, the defendant is entitled to an instruction thereon. Berra v. United States, 351 U.S. 131, 134, 76 S.Ct. 685, 688, 100 L.Ed. 1013."

The Court in Rutkowski v. United States, 149 F.2d 481, makes this expression of the Law:

> "If the crime of robbery has been made out, however, no additional proof is required to establish the crime of larceny. There may be larceny without robbery, but there can be no robbery without larceny, for robbery includes larceny." Lamore v. United States, 78 App. D.C. 12, 136 F.2d 766, robbery is in fact larceny committed by violence, and includes stealing and asportation as well as assault. Bertsch v. Snook, 36 F.2d 155; Costner v. United States, 139 F.2d 429.

Parham respectfully urges this Court to consider the fact that at no time and in no wise was it ever shown, demonstrated or sought to be shown or demonstrated by any means whatsoever that Parham at any time transported from the actual or immediate possession of the witness, Margaret Dendy Davis,any of the property alleged in the indictment as being the subject of the robbery. More importantly, Parham earnestly desires this Court to examine the record which abundantly and clearly illustrates that the waitress, Margaret Dendy Davis, at no time during her testimony claimed, stated, or implied that Parham removed from her hands or from anywhere in her actual, constructive or immediate personal possession her purse, her wallet, her pencils, her cosmetics, her money, or anything else. On the contrary, the evidence shows, according to the testimony of the complaining witness, that the defendant, this man now before you, Parham, threw her down and attempted to remove her underpants and under-garments without any reference whatever to any attempt whatsoever to remove from her person or to take, seize or carry away any of her personal belongings. Indeed, the testimony of this woman would tend strongly to indicate that the object of her assailant was satisfaction of some sexual desire, and, more likely than not, an attempted rape. Parham asks that it be carefully noted that in the indictment, in the testimony of government witnesses, in the argument of government counsel, and in all respects

except the testimony of the witness, Margaret Dendy Davis, nothing at all is ever mentioned concerning the possibility of an attempted rape of Mrs. Davis. Now, of course, it is outside of the record in this case, but justice should require that this Court be advised and informed that initially, and at the time of his arrest and at the preliminary hearing Odell Parham was not charged with robbery. He was charged with the offense of rape. After consideration by members of the office of the United States Attorney, it was decided and it was concluded that Odell Parham was not guilty of the crime of rape and, thereafter, someone made the determination that this citizen should be prosecuted upon the complaint of this lady not upon a charge of rape but upon a charge of robbery.

Parham's counsel did not seek any instruction upon lesser and included offenses and the reason for the lack of such a request, we believe, might be amply and adequately demonstrated and illustrated by even the most casual examination of the record in this case where, as aforesaid, Parham's counsel of his own choice sat idly by, made no objection to any evidence, made no objection to any portion of the charge, and, indeed, throughout the trial made a grand total of two objections, one of which he later withdrew.

In Williams v. United States, 131 F.2d 21, the crime involved was that of rape and although, on first face, it might appear that the facts and the law as set forth in that decision might not apply to the instant case, we say, and we say with utmost sincerity that the rationale of this decision is applicable and exactly in piont, insofar as the law is concerned, with Parham's case. We quote:

> "Under the circumstances of this case, if the jury had known that several crimes with their several factors must come in for consideration and had known the meaning of the factors, such as assault, intent, lack of consent, resistance to the full under the circumstances, physical force, fear, the necessity of some penetration, it might have concluded that this defendant was not guilty

> of rape or even of any offense, or if he were guilty of rape, his guilt was not such as would require the extreme penalty. We have always been proud that under our law the elements which go to make up a crime are definitely established. To insist that a jury be told what rape is, and, when circumstances require, what the included offenses are, in the eyes of the law, is not to demand meaningless ritual. The average man has some idea of what murder is, but we would not expect a judge to say, Jurors, you know what murder is, go and decide if this man is guilty of it. To say that the jury, under proper instruction, might not have found defendant guilty or might not have inflicted the death penalty is not to interfere with its judgment. We merely insist that the judgment of a jury be informed and be made under the safeguards of correct procedure."

IN THIS CASE IT WAS NOT EVER SHOWN OR DEMONSTRATED THAT THERE WAS ANY ACTUAL TAKING OF PROPERTY FROM THE DAVIS WOMAN. Only as an afterthought did she say concerning her purse that, "he had it and gone," and this was said in response to the very leading question of the prosecutor after she had given her complete statement as to the happening (J.A. 4).

When asked what was in her purse, Mrs. Davis gave a list of articles of personal property, none of which articles might possibly interest a robber (J.A. 5). The government attorney then asked pointedly, 'Did you have any money in your purse?" Then for the first time she said that in her change purse she had $25 or $28. (J.A. 5). NONE OF THE ARTICLES LOST BY MRS. DAVIS WERE FOUND IN THE APARTMENT OF PARHAM, OR NEAR HIS APARTMENT, OR IN HIS POSSESSION, EITHER ACTUAL OR CONSTRUCTIVE. The purse, billfold, money, and change purse of Mrs. Davis were never found. It is to be noted that Detective Rinaldo found on the lawn between the buildings some ball point pens and a few pieces of cosmetics after leaving the apartment of Mrs. Davis (J.A. 11). Detective Rinaldo did not even receive a call to go to the Davis apartment until 11:35 p.m. (J.A. 10). It can be assumed that there was a time lapse before arriving at Davis' apartment and a further time lapse before he left and thereafter discovered the pencils and cosmetics on the lawn between the buildings. When it is considered that the

testimony of Mrs. Davis indicates that the attack occurred shortly after 11:15 p.m., there is no doubt but that the pencils and cosmetics were discovered nearly an hour after the alleged attack. This could have certainly given rise to an inference by the jury that ALL of Mrs. Davis' property remained on the lawn and that some unknown person found the billfold, change purse, money and purse. Whether or not the assailant intended to rob Mrs. Davis and take and carry away her property would not be material under these circumstances. The important thing was that Parham was clearly entitled to an instruction upon the lesser and included offenses of assault, assault with intent to commit robbery, and attempted robbery. Parham's counsel failed and neglected to request such an instruction or instructions. That he so failed could not at all be termed surprising in light of his conduct of the entire trial. This appellant Parham sincerely begs this Court to accord him substantial justice irrespective of the failings of his counsel. There is no doubt but that the failure of the Court to instruct the jury upon the subject of lesser and included offenses when there was evidence to support the same deprived Parham of a fair trial in the American tradition.

CONCLUSION

In conclusion, Appellant submits to this Honorable Court that the Court below committed prejudicial and reversible error as to each and every one of the points hereinbefore set forth in Appellant's brief, therefore, Counsel respectfully urges this Honorable Court to reverse the verdict and judgment entered against Appellant in the Court below.

Respectfully submitted,

DE LONG HARRIS
1901 Eleventh Street, N.W.
Washington, D. C. 20001
Counsel for Appellant

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JOINT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on July 2, 1963

THE UNITED STATES OF AMERICA)	Criminal No. 748-63
)	
v.)	Grand Jury No. 829-63
)	
ODELL PARHAM)	Violation: 22 D.C.C. 2901 (Robbery)

The Grand Jury charges:

On or about July 16, 1963, within the District of Columbia, Odell Parham, by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Margaret L. Davis, property of Margaret L. Davis, of the value of about $28.75, consisting of the following: one purse of the value of $3.00, one billfold of the value of $3.00, $20.00 in money, a cosmetic bag and a quantity of cosmetics of the value of $2.00 and three pens, each pen of the value of $0.25.

/s/ David C. Acheson
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/ Charles E. Knowles
Foreman

[Filed February 7, 1964]

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

Washington, D.C.
December 2, 1963

1

BEFORE THE HONORABLE RICHMOND B. KEECH, United States District Judge, Trial.

* * * * *

6

MARGARET L. DAVIS

was called to the stand on behalf of the Government, being duly sworn, was examined and testified as follows:

7

DIRECT EXAMINATION

BY MR. SIDMAN:

* * * * *

8

Q. Now, did you work on the 16th of July? A. Yes, sir.

Q. What time did you get off work? A. It was 10:56 exactly when I punched my card.

* * * * *

Q. When you left work, did you drive your car? A. Yes, sir.

Q. Where did you drive to? A. On the parking lot opposite my building where I live on Savannah Street, Southeast.

Q. That is 1824 Savannah Street? A. Yes, sir.

Q. Now, were you alone? A. Yes, sir.

Q. Now, did there come a time when you parked your automobile in the parking lot? A. Yes, sir.

Q. Now, did you observe anything unusual or anyone unusual at the time you parked your car? A. Yes, sir.

9

Q. Now, about what time was this, Miss Davis? A. Oh, about 11:15 or 11:20.

Q. Now, what did you observe? A. I usually try to park in this particular spot where I saw this car but I noticed some people in there and they turned on their lights as if they was getting ready to drive off and then turned them off and so I said to myself, I will go ahead and park over here, on the other side and then when I got out, this man got out of his

car and I looked back to see where he was going , you know. It was late and he came towards me and like he didn't know where he was going and I turned around -- I turned right to go into the building where I live and he turned with me and I usually run up the bank but when I saw him walking up the bank, I walked on the sidewalk and then he was walking slow and he got in front of me a couple of times and the last time he got in front of me, he acted like he didn't know which building he was going into. There was three buildings over there, the one I live in and 1820 and 18 -- I don't know what the number of that is but I think it is 1822 and so he crossed -- I crossed over, passed him from behind and then he yoked me from the back as I was going into the building where I live.

10 Q. Did you go into your building before he came up to you?

A. No, sir.

Q. Were you preparing to go into your building? A. Yes, sir.

Q. Did you have your keys out? A. Yes, sir, I had my keys in my hand and my pocket book.

Q. Did you get up the steps leading to the door? Are there steps?

A. Leading to the building, that's all, as far as I got.

Q. Had you gone up those steps? A. It is one little step.

Q. Had you taken that step? A. Yes, sir, I had. I had my hand on the door.

Q. And what happened to you when you had your hand on the door?

A. This man grabbed me from behind and started choking me and wrestling on the ground.

Q. Did he wrestle you to the ground? A. Yes, sir.

Q. What were you wearing at that time, Miss Davis? A. White uniform.

11 Q. Now, could you describe to us what took place, the struggle?

A. Well, he had both his hands around my neck to begin with and then he fell to the ground and he left one of his hands go and started pulling my clothes up underneath and he broke my girdle because I had on a new girdle and he broke the strap on it, tore my uniform slightly and pulling at my under clothes.

Q. Did you have a purse with you? A. A black patent leather, yes, sir.

Q. Continue. After he reached under your underclothes, and was wrestling, what happened then? A. Well, he was still choking me like he was trying to kill me and so I tried to help myself and then I hit him in his private and he jumped up and ran and left me and I ran around the building from the other side to make sure of the tag number so I saw him get out of his car.

Q. You ran back to the parking lot? A. Yes, sir.

Q. Where was your purse? A. He had it and was gone. He was running up the hill.

12 Q. Now, did you determine what the license tag number was of the automobile that you had seen him get out of? A. Yes, sir.

Q. Do you recall what that was? A. Yes, sir.

Q. What was it? A. JX-131.

Q. Was it a District tag? A. Yes, sir.

Q. Now, did you call the police then? A. Well, I was yelling then and a policeman that works out there, ran over there and I was trying to tell him what happened and --

Q. Was that Special Officer Mitchell? A. Yes, sir. He let me in my door because I had dropped my keys. I didn't know where my keys was.

* * * * *

13 Q. Now, Miss Davis, I show you what has been marked as Government Exhibit 1 for identification and ask you whether you recognize that item?

* * * * *

A. It's my uniform that I wore that night, the night I had that accident.

Q. Now, there are stains, dirt stains on the rear of that uniform, Miss Davis. Were those stains on that uniform prior to the time you were assaulted? A. No, sir.

Q. Now, have you had this uniform in your possession ever since that night that you were assaulted? A. Yes, sir.

Q. What did you do with it this morning? A. I gave it to you, five or ten minutes ago, I think it was.

Q. Now, Miss Davis, what did you have in your purse? A. I had a couple of pencils and pens and a billfold that my sister had given me and my change purse, a powder and a couple tubes of lipstick, a scarf
14 and I think it was a green scarf and raincoat cap.

Q. Did you have any money in your purse? A. Yes, sir.

Q. Where was that, in the billfold? A. In the change purse.

Q. How much money did you have? A. It was about 25 or $28.

Q. Now, what would you estimate the value of your purse to be, Miss Davis? A. The purse itself or everything that was in it?

Q. No, just the purse itself. A. It was less than $5.

Q. How about your billfold? A. It was $5, the billfold. My sister gave it to me.

Q. Do you know how much money you had, actual money you had in your billfold? A. I didn't have any money in my billfold.

Q. In your change purse? A. Do I know exactly?

Q. Yes. A. No, sir. I knew that I had taken $7 to work with me that
15 day because I had intended to go on downtown and with the money that I made, I worked two shifts that day, so I knew I had over $25 because I know how many tips I got, how much they were from my stubs.

Q. Do you see in this court room, Miss Davis, the man who assaulted and robbed you? A. Yes, sir.

Q. Where is he? A. Sitting next to the attorney.

* * * * *

THE COURT: Yes, sir, the record will reflect that she has identified the defendant.

* * * * *

16 CROSS EXAMINATION

BY MR. CLARKE:

* * * * *

Q. * * * Now, what time did you get off from work? A. 10:56.

Q. Approximately what time did you get home? A. About 11:15.

* * * * *

Q. Now, was the car that you saw there, were there several people around the automobile when you got there?

17

* * * * *

A. No, I didn't see anyone standing on the lot.

* * * * *

Q. Did you see anybody in a car? A. Yes, I did.

Q. Approximately how many people were in this car? A. I didn't notice at that time. I just saw some people in the car. I don't know how many.

Q. It was the same automobile later identified as being the one belonging to the defendant? A. Yes.

Q. And there were several people in the car? A. Yes.

Q. Now, I believe you stated that you then walked across the street from the parking lot up to your door is that correct? A. Yes.

Q. Now, approximately how many buildings are there in this area? A. There is three there in the court where I live.

18

Q. Are these buildings relatively close together? A. They are not too close together.

Q. Was this a hot night? A. Yes, it was warm.

Q. Are the buildings air conditioned? A. Some of them are.

Q. By that I take it you mean that some of the people have their own individual units? A. Yes, that's right.

Q. Are they air conditioned on the whole? A. No.

Q. Do a lot of people raise their windows around there in the summer time? A. You just slide them open. They don't raise them. They open from the side.

Q. Was this a relatively congested area -- there are quite a number of windows around there? A. Yes.

Q. Now, when you were allegedly grabbed by this person, whom you later identified as the defendant, did you make any outcry? A. I couldn't.

19 Q. You couldn't? A. That is right. I was bleeding out of my mouth when he let me go. I couldn't.

Q. You were what? A. I was bleeding out of my mouth when he did let me go. I couldn't holler or nothing.

Q. You were bleeding out of your mouth, is that right? A. Yes.

Q. Were you hurt anywhere else? A. On my shoulders and my face and I had a scratch on my hand.

Q. Did you require any hospitalization? A. I didn't go.

Q. Now, I believe you stated that this is the dress that you had on that night? A. Yes.

Q. Is there any reason why you didn't wash that dress up to now? A. I was told to keep it and not wear it.

Q. By whom? A. Det. Rinaldo told me to keep the dress that I might need it.

Q. Did he tell you to put any dirt on it?

* * * * *

20 THE WITNESS: No, sir.

* * * * *

BY MR. CLARKE:

Q. Did you give a description of the type of clothing that whomever attacked you or grabbed you to Det. Rinaldo? A. Yes.

Q. What description did you give? A. I told him he had on a light colored shirt and khaki pants and a cap.

Q. And khaki pants and a light colored shirt, is that correct? A. Yes.

Q. Did you tell him it was a sport shirt? A. Yes.

Q. You told him it was a sport shirt? A. Yes.

21 Q. You saw this shirt clearly? A. Well, it was night and I saw it the best I could.

Q. Yes. And it was a light colored sport type shirt? A. Yes.

Q. The shirt had a collar to it? A. Yes, it had a collar.

Q. Now, prior to the time that you left work to go home, did you have anything to drink? A. No.

Q. Do you drink? A. Yes.

Q. Do you drink heavily? A. No.

Q. Now, recalling your attention to the preliminary hearing in this matter, I will ask you if --

THE COURT: Just a minute. There are two purposes which you can use that, Mr. Clarke. One would be for the purpose of refreshing her recollection and the second way would be for purposes of impeachment and if you --

MR. CLARKE: May we approach the bench, Your Honor?

THE COURT: Certainly.

(Bench Conference.)

22 MR. CLARKE: Your Honor, at the time of the preliminary hearing of this matter, I asked her specifically in regard to two convictions she had about drinking which she denied.

THE COURT: Now, what are the convictions?

MR. CLARKE: They are convictions for drinking.

THE COURT: All right. You have a right to ask her that, sir. What page is that, sir?

MR. CLARKE: What page?

THE COURT: What page of the transcript?

MR. CLARKE: I don't have it with me.

THE COURT: Where is it, sir?

MR. CLARKE: It is over there with Mr. -- well, I will withdraw it.

THE COURT: All right, sir.

(End of Bench Conference.)

BY MR. CLARKE:

Q. Now, Mrs. Dendy -- I mean, Miss Davis, is the area in which you were living -- grabbed, well lighted? A. No, just one light on front of the door.

Q. One light? A. Yes.

23 Q. And you were grabbed from behind, is that right? A. Yes.

Q. And you were thrown to the ground, is that right? A. Yes.

Q. Now, did you see a man -- the man's face? A. I had seen him all the way across the parking lot. I had been watching him because he acted like he didn't know where he is going. My sister told me to be careful late at night and I didn't want the man to get too close to me.

* * * * *

REDIRECT EXAMINATION

BY MR. SIDMAN:

Q. Mr. Clarke asked you about some clothing. A. Yes.

* * * * *

24 Q. Miss Davis, I show you what has been marked as Government's Exhibit 2 for identification and ask you whether this looks like the trousers worn by the assailant? A. Yes.

Q. Now, I show you what has been marked as Government Exhibit 3 for identification and ask you whether that looks like the kind of shirt worn by the defendant? A. Yes.

Q. Now, you will notice it doesn't have a collar? A. Yes.

Q. Did the shirt of the defendant have a collar or not? A. I said yes but I don't exactly remember but I know it was a light shirt.

Q. I see. Do you live alone, Miss Davis? A. Yes, sir.

* * * * *

RECROSS EXAMINATION

BY MR. CLARKE:

Q. Now, Miss Davis, if you recall, I asked you specifically, did the shirt have a collar. Do you remember your answer? A. It was yes.

25 Q. Now, I asked you specifically what color were the pants that the man had on allegedly. Do you remember what your answer was?

A. Khaki.

Q. What color did you describe them to be? A. I didn't say any color pants. But I said before when he was -- when I came to court, I said light colored.

Q. I asked you specifically did you describe the clothes of whomever you say grabbed you to Det. Rinaldo. Do you recall what your answer was at that time? A. I didn't understand you.

Q. I asked you did you describe the man that grabbed you?

A. To Det. Rinaldo?

Q. Yes. A. Yes.

Q. And the clothing? A. Yes.

Q. Do you recall what color you told Det. Rinaldo that the pants were that the man had on? A. I said light colored, khaki looking pants.

Q. And a sport shirt, is that correct? A. It wasn't a dress shirt.

* * * * *

26 FRANK RINALDO

was called to the stand on behalf of the Government, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SIDMAN:

* * * * *

A. Frank Rinaldo, assigned as a detective to the 11th Precinct.

Q. Det. Rinaldo, were you so assigned on the 16th of July of this year? A. Yes, sir, I was.

Q. Did you receive a call at 11:35 p.m. to respond to the address of Savannah Street, Southeast? A. Yes, sir.

* * * * *

27 Q. Now, on your -- as you approached the premises 1824 Savannah Street, Southeast, did you notice anything unusual? A. We found a set of house keys on the lawn outside.

Q. Did you ultimately determine the owner of those house keys? A. Yes.

Q. Who was that? A. Margaret Dendy Davis.

Q. Now, did you discover anything else besides the house keys? A. Not at that time, no, sir.

Q. What did you do after you discovered the house keys? A. We proceeded up to Miss Davis' apartment.

Q. Who were you with? A. Officer Baughn.

* * * * *

Q. Now, did you have a conversation with Miss Davis? A. Yes,
28 sir, I did.

Q. * * * but did there come a time after the conversation when you left the building? A. Yes, sir.

Q. Did you discover anything upon leaving the building? A. Yes, sir. We found some more property belonging to Miss Davis on the lawn between the buildings.

Q. What was that property, if you recall? A. It was some ball point pens and pencils and I believe a few pieces of cosmetics.

Q. Now, when you saw Miss Davis, what was she wearing?

A. A white uniform.

Q. I show you Government Exhibit 1 for identification and ask you whether this uniform is similar to that which she was wearing? A. Yes, sir, it is.

Q. Now, as a result of your conversation with Miss Davis, did you make a check as to the owner of a certain automobile? A. Yes, sir, I did.

Q. Now, did you have a license number in your possession?

A. Yes, sir.

29 Q. Do you recall that license number now? A. I believe it was JX-131.

* * * * *

Q. Now, what did you do after you determine the -- after you determined the vehicle was listed to Odell Parham? A. We went to Mr. Parham's house.

* * * * *

THE WITNESS: 3421 18th Street, Southeast, Apartment 104.

BY MR. SIDMAN:

Q. Now, did Miss Davis accompany you to that address? A. She remained in the automobile, yes, sir. She remained in the automobile.

Q. Did you go up to the apartment occupied by the defendant?

A. Yes, sir, I did.

Q. Now, did you have a conversation with him? A. Yes, sir, I did.

30 Q. During that conversation, did you ask him what he was wearing? A. Yes, sir.

Q. Now, what was he wearing when you saw him? A. He had on shorts, under shorts.

Q. Under shorts? A. Yes.

Q. Was he alone? A. He was alone in the apartment, yes, sir.

Q. Now, did you ask him about his attire earlier that evening? A. Yes, sir, I did.

Q. How did you come to ask him what he was wearing? A. Well, after studying him for a moment, he answered the description that Miss Davis had given and I asked him what he was wearing and I asked him to accompany me first to the car outside and then I asked him what he was wearing and he said he was -- he pointed to a pair of pants draped around on the chair and said, those are the pants there on the chair -- table and he put on a pair of pants, blue pants, to wear out to the car but I carred those in my hand. (INDICATING)

Q. Now, you have been pointing, sir, to an object and I show you Government Exhibit 2 for identification and I ask you whether or not those

31 are the pants that Odell Parham said he was wearing earlier that evening? A. Yes, sir, they are.

Q. How do you know? A. My initials, F.R. are in the inside here with green ink, sir.

Q. Now, you will observe the condition of those pants. Was that the condition of those pants when he gave them to you? A. Yes, sir, they are.

Q. Now, I show you Government Exhibit 3 marked for identification and ask you whether you have seen that before? A. Yes, sir, that is the shirt that Odell said he was wearing before he came to the apartment.

Q. Now, -- A. My initials are in here in green ink, F.R.

Q. Odell Parham gave you Government Exhibits 2 and 3? A. Yes, sir. He gave me the pants, I know. I believe Officer Mitchell, a special officer with the department got the shirt.

* * * * *

32 Q. Did you take the defendant outside? A. Yes, sir.

Q. What happened then? A. Miss Davis informed me not to look any further, that he is the man that she had the incident with.

* * * * *

CROSS EXAMINATION

BY MR. CLARKE:

Q. Now, Officer Rinaldo, when you went to this defendant's home, did you have any conversation with him? A. Yes, sir, I did.

Q. What was the text of that conversation? A. Well, I don't remember it word for word but I asked him where his car was and who was driving his car and he said he didn't know who had his car or who was driving it and then after a few minutes, he said he believes a fellow by the name of Billy Hill had it and I said where is the car now and he didn't know, but he offered after a few minutes more to accompany me to see if we can find it.

33 Q. Did he tell you he had loaned Billy Hill the car? A. No, sir, he did not.

Q. Did you -- did he tell you where he had been that evening?

A. Yes, sir.

Q. Where did he say he had been? A. Well, approximately 12:30 when I arrived at Mr. Parham's house, he told me he had been home about an hour and a half and so he said he had been out to northeast Washington with a fellow by the name of Guy and then they returned to southeast and Mr. Guy left him off in southeast and went on to his apartment.

Q. Now, Detective, did he tell you how he got the dirt on his clothes?

A. He said he played soft ball earlier in the day.

Q. Did you -- did he tell you that he caught a soft ball game?

A. I don't remember what he played but he said he played soft ball.

Q. Did you ask him specifically if he had anything to do with --

A. Yes, sir, I did.

Q. What was his answer? A. His answer was no.

34 Q. Did he tell you that he left his car and gone with Mr. Guy to northeast? A. Yes, sir. He said he left his automobile on the parking lot where Miss Davis parked her car.

Q. Did he tell you that he left the car with a number of fellows in there? A. Yes, sir, he gave me the name of some fellows that he last saw in his car.

* * * * *

130 FRANK RINALDO

was recalled to the stand, previously sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. SIDMAN:

Q. Det. Rinaldo, when you interviewed this defendant in this apartment, did you? A. Yes, sir.

Q. Approximately what time? A. About 12:30.

Q. In the early morning hours of July 17? A. Yes.

Q. Did you ask him about his whereabouts for the time prior to your interview? A. Yes, sir.

Q. What -- did he say where he had been? A. No, sir.

Q. Did he say how long he had been home? A. About an hour or an hour and a half.

Q. This was about 12:30 when you -- A. Yes, sir.

Q. Now, sir, there came a time when you returned to that apart-

131 ment after this defendant had been arrested? A. Yes, sir.

Q. Who was in that apartment when you got there? A. When I knocked on the door, a fellow came to the door who I later identified as Billy Hill and he said his name was Odell Parham. After a few moments, he --

MR. CLARKE: I will object to this. This is hearsay as far as this defendant is concerned.

THE COURT: This is as to the witness Hill. Let's keep the record straight. Do you see Billy Hill here today, Officer?

THE WITNESS: Yes, Your Honor, he is sitting next to the back row.

* * * * *

CROSS EXAMINATION

* * * * *

132 BY MR. CLARKE:

Q. During the course of your talking with Mr. Hill, did he make a statement to you? A. Yes, sir, he did.

Q. Did you write it down or did he write it down? A. No, I wrote it down. I typed it out.

Q. You typed it out? A. Yes, sir.

Q. Did he have occasion to read what you typed out as well as sign it? A. That is a statement of facts used for court purposes and he doesn't see that.

Q. Sir, would you please confine your answer to the question. Did you have the occasion to type out a statement which he could read and sign? A. No, sir.

133 Q. During the course of your investigation, did you have the occasion to type out a statement which was an account of all the facts involved in --

MR. SIDMAN: I object.

THE COURT: I will sustain the objection to this.

* * * * *

REDIRECT EXAMINATION

BY MR. SIDMAN:

Q. You spoke to the defendant -- William Hill after he gave you his right name, is that right? A. Yes.

Q. You asked him about the movements of this defendant? A. Yes, sir.

Q. During the evening hours of July 16? A. Yes, sir.

Q. Did William Hill say he was with him during the evening hours? A. Yes.

Q. Did he state he was in the parking lot with him? A. Yes.

134 Q. What did he say as to this defendant's movements? A. I put the question this way: Did you ever see Parham leave his automobile at any time and he said, yes, he did. He left for approximately ten minutes and it could be less and it could be more and walked in the general direction of the apartments in the rear of the parking lot. That is all he said, sir.

Q. Did he say he saw him come back? A. He said he came back later but he did not get into his car. He walked past the car.

Q. Did he tell you which car he observed this defendant go to? A. Some guys car in the back. He may have said Mr. Guy or someone else.

Q. Did he say anything about moving in the parking lot from where he was to some immediately adjacent car? A. Mr. Parham?

Q. Did Mr. Hill say anything like that to you? A. No, sir, he did not say that, not that I can remember. He may have said it.

* * * * *

135 RECROSS EXAMINATION

* * * * *

BY MR. CLARKE:

Q. Did he tell you there were a number of people -- did Mr. Hill tell you there were a number of people on the parking lot? A. Yes, sir.

* * * * *

FURTHER REDIRECT EXAMINATION

BY MR. SIDMAN:

Q. He told you that this defendant left the parking lot and walked in the direction of the apartment houses? A. Well, he -- the apartments edge on the parking lot and in that direction.

Q. That is what he told you? A. Yes, sir.

* * * * *

136 FURTHER RECROSS EXAMINATION

BY MR. CLARKE:

Q. Which edge of which apartment on which street? A. It would be on the east side of the parking lot.

Q. What? A. The parking lot is bordered on Savannah, Savannah Terrace and 19th Street, all three streets come together.

Q. Is the parking lot that you are referring to across -- let me rephrase that.

Is the complaining witness' house across the street from the parking lot? A. Yes, sir.

Q. Around the corner? A. You can see her apartment from that parking lot.

Q. Is the door to her apartment around the corner? A. Yes, sir.

* * * * *

137 FURTHER REDIRECT EXAMINATION

BY MR. SIDMAN:

Q. What he told you in the early morning hours of the 17th, is that the same thing he told you when he was interviewed in the office of the Assistant United States Attorney? A. Yes, sir.

* * * * *

EARL J. MITCHELL

was called to the stand on behalf of the government, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SIDMAN:

* * * * *

Q. Mr. Mitchell, what do you do? A. I am a special policeman, patrol from the Parklands area.

* * * * *

138 Q. Who are you employed by? A. Caffritz Company.

Q. Now, does your providence of patrol include 1824 Savannah Street, Southeast? A. Yes, it does.

Q. Sir, did you have occasion to be on duty in the evening hours of July 16 of this year? A. I did.

Q. Did there come a time when something unusual happened? A. Yes.

Q. And after this -- did you receive certain information from Miss Davis? A. Yes, I did.

Q. Did there come a time when the police arrived on the scene? A. Yes.

Q. Now, this unusual occurrence, you did not see any assault or robbery, did you, sir? A. No, I didn't.

Q. Now, after you spoke to Miss Davis, and the police officers arrived on the scene, did you travel somewhere with the police officers?

139 A. I did.

Q. Where did you go? A. We went to Mr. Parham's apartment.

Q. Now, did there come a time when you -- Det. Rinaldo had a conversation with a fellow named Parham? Do you see Odell Parham

in the court room? A. Yes.

Q. Where is he? A. Sitting there to the left of Mr. Clarke.

* * * * *

Q. Did Mr. Parham make any statement to the police officer about his whereabouts in the early evening hours, where he had been, if you recall? A. Well, as I recall -- the detective asked him how long he had been home and he said that he had been home about an hour or so.

* * * * *

CROSS EXAMINATION

BY MR. CLARKE:

140 Q. Now, Officer, on this particular evening, how did you happen -- how did Miss Davis happen to come to your attention? A. Well, in my patrols through the area, I checked in at the office with the dispatcher and he told me that he had received a call of a complaint in the court near 1824 Savannah Street and I went over there to investigate.

Q. Yes. A. That is where I first came in contact with Miss Davis.

Q. Were you there before anybody else arrived there? A. I was the first officer on the scene.

Q. Now, did you have occasion to look on the parking lot up there? A. Yes, I looked on the parking lot.

Q. Were there any fellows on the parking lot when you got there? A. I didn't notice any.

Q. Approximately what time did you get to the parking lot, sir? A. Oh, I don't know the exact time but it was about ten or 15 minutes after the incident occurred.

Q. What time was this? A. This was somewhere around 11 p.m.

141 Q. Now, did you have occasion to observe this defendant when you went into his house? A. Yes.

Q. Did he have any marks or scratches or anything about his physical appearance to you that would indicate that he had been in a struggle? A. I didn't notice any.

* * * * *

JERRY BAUGHN

was called to the stand on behalf of the government, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SIDMAN:

* * * * *

A. Jerry V. Baughn, Private, Metropolitan Police Department.

* * * * *

142 Q. Officer Baughn, did you have occasion to participate in the investigation of a robbery of Margaret Davis? A. Yes.

Q. Were you with Det. Rinaldo who is here in court when he went to the premises of Odell Parham later on in the early morning hours of July 17? A. Yes, sir.

Q. I am talking about a period of time subsequent to the arrest of the defendant Parham. A. Yes.

Q. Did you have occasion to go with Det. Rinaldo? A. Yes.

Q. And who was in the apartment of Odell Parham? A. Billy Hill.

Q. Now, did Billy Hill give you his correct name when you first entered? A. First entered, no, sir.

Q. Now, did the converstion take place between Det. Rinaldo and Hill as to the events of the late evening hours of July 16? A. Correct.

Q. Now, did Hill state anything as to whether or not this defend-

143 ant remained on the parking lot adjacent to the premises of Miss Davis? A. He stated that he got out of the parking lot.

Q. Who got out of the parking lot? A. Parham got out of the car.

Q. And did what? A. And walked down to Savannah Street and returned back about ten minutes later.

* * * * *

CROSS EXAMINATION

BY MR. CLARKE:

Q. And in your conversation with Mr. Hill this evening, Officer, did you happen to see him -- ask him if he had Parham's car keys?

A. I didn't, no, sir.

Q. I beg your pardon. A. I did not, sir. No, sir, I didn't ask him.

Q. Well, did Officer Rinaldo ask him? A. I don't remember, sir.

* * * * *

144 Q. Sir, were you working in plain clothes that night or in uniform? A. I was in plain clothes.

Q. Were you with Officer Rinaldo when you originally responded to this call? A. Yes, sir.

Q. Do you remember what time the call was made or that you received the note to go to the scene? A. Approximately 20 minutes to 12.

Q. Now, as a result of interrogating Miss Davis, did you have occasion to look up a tag number? A. Yes, sir.

* * * * *

145 Q. Approximately what time was it when you talked to Miss Davis? A. When we arrived at the scene it was approximately a quarter of 12.

Q. Quarter of 12? A. Approximately that.

Q. How long did you talk to her? A. Oh, it was about -- I would say, sir, 20 or 25 minutes.

* * * * *

146 Q. Where did this conversation take place? A. It was partly in her apartment and partly on the stairway.

Q. Now, as a result of this conversation, did you make any calls there? A. Not me, sir.

Q. Did there come a time when you heard a tag number of a car mentioned? A. Yes, sir.

Q. About what time was this? A. It was while we were talking to her.

Q. Did you make a call after that? A. Did I make a call.

Q. Did Officer Rinaldo make a call, either of you? A. I didn't make a call.

* * * * *

147 Q. What time did you go to this defendant's house? A. I would say about 12:30.

Q. What time did you leave? A. What time did we leave his house?

Q. Yes. A. Oh, I would say it was about -- within ten minutes.

Q. Were you in the car when this defendant was taken to the precinct? A. In the car that took him to the precinct, no, sir.

Q. How did you get there? A. I was in the cruiser with Det. Rinaldo. A scout car transported him to the station.

148 Q. Were you in the scout car? A. No, sir.

Q. Did you go into this defendant's house? A. No, sir.

Q. When did you first see the defendant? A. When he came out to the car with Det. Rinaldo.

* * * * *

MARGARET DAVIS

was recalled to the witness stand on behalf of the government, previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SIDMAN:

Q. Miss Davis, you have seen Mr. Hill testify here. Is that the man who assaulted you? A. Mr. Hill?

Q. Yes. A. No.

149 Q. Are you positive? A. I am positive.

Q. Are you positive he is not the man who assaulted you? A. I am positive.

Q. That man? A. Yes.

* * * * *

CROSS EXAMINATION

BY MR. CLARKE:

Q. Immediately after you were assaulted, did you make any outcry or screams? A. Yes, sir.

Q. Did you run to the corner to find out which way the man went? A. Yes, sir.

Q. Was there anybody on the parking lot when you got there? A. The car was still there.

150 Q. Were those fellows that you saw previously still there? A. They were still in the car.

Q. They were? A. Yes.

* * * * *

THE COURT: Have either of you any prayers? I assume you would want alibi and mistaken identity?

MR. CLARKE: Yes, sir.

THE COURT: You also want reputation?

MR. CLARKE: Yes.

* * * * *

171 CHARGE TO THE JURY

THE COURT: Ladies and Gentlemen, we have just about reached the point in this case when it will be your duty to retire to the jury room, select your foreman and determine the guilt or innocence of this defendant who stands charged before you in a one count indictment with the offense known to the law as robbery.

I think by now you know it is the duty of the court to instruct you as to the law of the case, namely, the rules and principles which shall guide you in determining the issues in the case and furthermore you are bound and obligated to follow those rules and principles.

On the other hand, you Ladies and Gentlemen are the sole judges of the facts and it will be for you to determine all issues of fact from the testimony adduced from the witness stand and reasonable inferences to be deduced from proven facts and in conformity with your recollection.

Counsel for the government and counsel for the defense each have the right to make opening statements, indicating to you what they hope they may be able to show for their respective sides and at the conclusion of the case, to sum-up, indicating to you what they believe in fact they have been able to show for their respective sides.

172 This is a right and privilege of both counsel. The court merely

states to you that statements of counsel, whether government or defense, do not constitute evidence in the case and furthermore if your recollection be at variance with the recollection of government counsel or defense counsel or the court, insofar as facts are concerned, it is your recollection which controls, you being the sole judges of the facts.

The mere fact that a defendant has been indicted as indicated by the sheet of paper which I displayed to you is not to be construed by you as evidence of his guilt. It is not. The sole purpose of an indictment is to advise a defendant of the charge or charges he must face when the case comes on for trial. It is not evidence.

Every defendant in a criminal case is presumed to be innocent and this presumption of innocence attaches to a defendant throughout the trial. The burden is on the government to prove a defendant guilty beyond a reasonable doubt and if the government fails to sustain this burden, then you must find the defendant not guilty.

You may well ask what is meant by the phrase a reasonable doubt. It does not mean any doubt whatsoever. Proof beyond a reasonable doubt is proof to a moral certainty and not necessarily proof to an absolute
173 or mathematical certainty.

By a reasonable doubt, as the name implies, is meant a doubt based on reason and not any whimsical or capricious conjecture. It is a doubt which is reasonable in view of all the evidence.

Therefore, if after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied with the guilt of a defendant, then you have a reasonable doubt; but, if after such impartial comparison and consideration of all the evidence, you can truthfully say that you have abiding conviction of a defendant's guilt, such as you would be willing to act upon in the weighty and important matters relating to your personal affairs, then you have no reasonable doubt.

I have already said to you that you are the sole judges of the facts and so too are you necessarily the sole judges of the credibility of the

various witnesses who appeared before you.

What does this mean? It merely means worthiness of belief. How do you determine that?

You should take into consideration the demeanor of the witness on the stand, his manner of testifying, whether he appears to you to be a
174 truth-telling witness, his opportunity of knowing the facts and circumstances about which he has testified, whether he entertains any bias or prejudice for or against the defendant and then from all these facts and circumstances, it becomes your duty to give the proper weight to the testimony of each and every witness who has testified in the case.

Now, there has been introduced into this case evidence of the good character of the defendant.

Evidence of good character, as well as other types of testimony, should be considered by you in conjunction with all the evidence before you and under some circumstances, evidence of good character alone may be sufficient to create in your minds a reasonable doubt although without it, the other evidence would be convincing.

You are further instructed that while the defendant is a competent witness to testify in his own behalf, you have the right to take into consideration his interest in the outcome of the case and give to his testimony that weight which you deem it fairly entitled to.

You are further instructed that you are not necessarily to be controlled by the number of witnesses that have come before you testi-
175 fying for one side or the other.

You are instructed that the testimony of one witness, entitled to full credit, is sufficient for the proof of any fact and may justify a verdict even if a number of witnesses have testified to the contrary.

In courts of law as well as in our own personal affairs, when we are called upon to determine disputed questions of fact, there are two kinds of evidence upon which our conclusions may be based. One is known as direct evidence and the other is known as indirect or circumstantial evidence.

Direct evidence, for example, is evidence of a witness himself as to what he saw or what he heard as an eye witness of the offense under inquiry.

Indirect evidence is supplied by testimony as to facts and circumstances which tend to show that the offense under inquiry has been committed and by whom it has been committed.

In other words, indirect evidence is composed of proved facts which raise a logical inference as to the existence of the fact that is in issue in a particular case and which by experience have been found to be so associated with that fact that in the relation of cause and effect, they lead to a satisfactory conclusion.

176 In this case both types of evidence have been introduced. Both types of evidence are entitled to consideration by the jury. In certain cases, a jury may be more convinced by circumstantial evidence than by direct evidence but the rule of law is that whether the evidence be direct or circumstantial or a combination of the two, that evidence must add up to proof beyond a reasonable doubt before a defendant may be convicted of a criminal offense.

So much for the general instructions which you have for your consideration in most of the cases which come before you for determination.

I now move to the specific charge which this defendant faces, namely, the charge of robbery but before I reach the elements which make up the offense of robbery, one of the defenses in this case is what is known as alibi.

In other words, there has been testimony to the effect that the defendant was not present at the time and place when this crime of robbery was committed.

The defense of alibi is a legitimate and legal and proper defense. The evidence adduced in support of this offense as well as all the other evidence in the case, should be given such weight and such consideration as you the members of the jury think it entitled to under all the facts and

177 circumstances in the case.

If, after a full and fair consideration of all the facts and circumstances in evidence, you find that the government has failed to prove beyond a reasonable doubt that this defendant was present at the time and place of the commission of the offense charged in this indictment, then one of the essential elements of the offense is lacking and it will be your duty to find the defendant not guilty.

If, however, you do find that the government has proven beyond a reasonable doubt that this defendant was in fact present at the time and place of the offense, then you will have for your consideration and determination whether the essentail elements constituting the offense of robbery have been proven beyond a reasonable doubt.

The statute on which this count is based reads as follows:

Whoever, by force or violence, whether against resistance or by sudden and stealthy seizure or snatching or by putting in fear, shall take from the person or immediate actual possession of another, anything of value, is guilty of robbery.

178 In order for you to find this defendant guilty of robbery, you must find that the government has proven beyond a reasonable doubt the following elements:

1. That the defendant took something of value from the complainant.

2. That he took it unlawfully and with the intent to convert it permanently to his own purpose.

3. That he took it from the complainant's person or immediate actual possession.

4. That he took it by force or violence, against resistance or by sudden or stealthy seizure or snatching, or by putting the complainant in fear.

Now, as to the first essential element enumerated, namely, that he took something of value, the actual value of the thing taken is of no consequence as long as it has some value.

If you should find that the defendant took any one of the items described in the indictment, that is sufficient to satisfy that element.

As to the second element enumerated, that he took the property

unlawfully and with the intent to convert it permanently to his own use, intent ordinarily cannot be proved directly because there is no way of fathoming and scrutinizing the operations of the human mind, but in-

179 tent may be deduced from circumstances and from things done and from things said and a person is presumed to intend the natural and probable consequences of his act.

As to the third element, that he took it from the complainant's person or immediate actual possession, you have heard the evidence and no further explanation is needed.

As to the fourth element, that the defendant took the property by force or violence, against resistance, no further definition is necessary. It will be for you to determine whether the government has proven this element, also.

If you find that the government has proven that this defendant was in fact at the scene at the time of the offense and you further find that the government has proven each of the essential elements which I have enumerated for you and beyond a reasonable doubt, then you may find this defendant guilty as charged.

If you find that the government has failed to prove any one of the essential elements enumerated, including the presence of this defendant at the time and place of the offense, then you would find this defendant not guilty.

180 When you Ladies and Gentlemen took your places in the jury box, each of you swore that you would determine the guilt or innocence of this defendant from the testimony adduced from the witness stand and reasonable inferences to be deduced from proven facts and in conformity with your recollection thereof.

That is your duty and you are further instructed that your verdict shall not be motivated by any bias or prejudice for or against the defendant nor by any sympathy.

Your verdict in this case will be guilty or not guilty. Your verdict must be unanimous.

Has government counsel anything to add?

MR. SIDMAN: Nothing.

THE COURT: Has defense counsel anything to add?

MR. CLARKE: Nothing, Your Honor.

* * * * *

JUDGMENT AND COMMITMENT

On this 10th day of January, 1964 came the attorney for the government and the defendant appeared in person and by counsel Walter Clarke, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of ROBBERY as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) years to Six (6) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,443

ODELL PARHAM, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
BARRY SIDMAN,
MAX FRESCOLN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In a robbery case where the complainant testified that appellant yoked her, wrestled her to the ground, struggled with her, and finally ran off with her purse, and where appellant testified he was not present, and where appellant had no objection to the judge's charge to the jury and requested no additional instructions:

1. Was it error for the judge in his instructions not to amplify the meaning of the elements of robbery that there must be a taking of property from a person, and that the taking must be by force and violence?

2. Did not the judge properly instruct the jury to the effect that the Government must prove that appellant took the property with intent to convert it permanently to his own use, and to the effect that in determining what intent appellant had, the jury could consider the circumstances and the things done and said, for a person is presumed to intend the natural and probable consequences of his act?

3. Did not the judge properly give no instruction on petit larceny?

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*Cases chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

An indictment filed August 19, 1963, charged appellant with robbery (22 D.C.C. 2901) (J.A. 1). A jury convicted appellant on December 2, 1963. By Judgment and Commitment filed January 10, 1964, appellant received a sentence of imprisonment for two to six years (J.A. 29). This appeal followed.

Margaret L. Davis testified that about 11:15 on the evening of July 16, 1963, when she was returning home from work, appellant yoked her, wrestled her to the ground, pulled at her underclothes, and finally ran off with her purse (J.A. 2-4). When Miss Davis, who lived at 1824 Savannah Street, S.E., had been parking her car near her apartment building, she saw

appellant get out of that car (J.A. 2, 6). She testified:

> * * *when I got out, this man got out of his car and I looked back to see where he was going, you know. It was late and he came towards me and like he didn't know where he was going, and I turned around - I turned right to go into the building where I live and he turned with me; and I usually run up the bank, but when I saw him walking up the bank, I walked on the sidewalk; and then he was walking slow and he got in front of me a couple of times, and the last time he got in front of me. He acted like he didn't know which building he was going into. There was three buildings over there, the one I live in and 1820 and 18 ---- I don't know what the number of that is but I think it is 1822 -- and so he crossed. I crossed over, passed him from behind, and then he yoked me from the back as I was going into the building where I live. (J.A. 2-3).

At the time, Miss Davis had her keys and her pocketbook in her hand (J.A. 3). The light at the door was on (J.A. 8). Appellant wrestled Miss Davis to the ground and struggled with her underclothes with a free hand (J.A. 3. Appellant was choking Miss Davis, so she could not cry out. (J.A. 4, 7). Miss Davis hit appellant "in the private" (J.A. 4). Appellant jumped up, took Miss Davis's black patent leather purse containing approximately $25 and ran up the hill (J.A. 4, 5).

Miss Davis ran and checked the tag number on the car she had seen appellant get out of. It was JX-131. Miss Davis was yelling then, and a special policeman came and let her into her apartment, because she had dropped her keys. (J.A.4.) Miss Davis positively identified appellant as the man who robbed her (J.A. 5). When asked on cross-examination whether she saw the man's

face, she said:

> I had seen him all the way across the parking lot. I had been watching him because he acted like he didn't know where he is going. My sister told me to be careful late at night, and I didn't want the man to get too close to me. (J.A. 9.)[1/]

Detective Frank Rinaldo of the 11th Precinct testified that on responding to a call to Miss Davis's address, he found her house keys on the lawn (J.A. 10). Miss Davis gave him the license number of the car appellant had got out of. The officer determined that the car was listed to appellant. (J.A. 11.) Then Miss Davis accompanied Detective Rinaldo to appellant's address where she identified appellant to the officer as the man "she had the incident with" (J.A. 13).

Judge Keech's charge to the jury is set forth completely at J.A. 23-29. Appellant said he had nothing to add (J.A. 29).

1/ Miss Davis did not testify she never clearly saw her assailant prior to the attack, or that she viewed him during the attack in semi-darkness as appellant states (Br. 3). See J.A. 8-9.

STATUTE AND RULE INVOLVED

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Rule 30, Federal Rules of Criminal Procedure, provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

SUMMARY OF ARGUMENT

Appellant made no objection to the instructions at trial, and he is unable now to make the necessary showing that there was basic and highly prejudicial error in them. The record shows that there was no necessity for a definition of "taking" as one of the elements of the offense of robbery. The instructions read as a whole show that the jury was clearly advised that they had to find that appellant had intent to convert the property taken to his own purpose. There was no evidence to support a petit larceny instruction in this case, so the judge correctly did not give such an instruction.

ARGUMENT

The judge's instructions to the jury were proper.

Appellant made no objection to the instructions at trial. Thus to obtain a reversal of his conviction he has to show that whatever flaws the instructions allegedly had constituted basic and highly prejudicial error. Willis v. United States, 106 U.S. App. D.C. 211, 213, 271 F.2d 477, 479 (1960), cert. denied, 362 U.S. 964; Obery v. United States, 95 U.S. App. D.C. 28, 217 F.2d 860 (1954), cert. denied 349 U.S. 923; Rule 30, Fed. R. Crim. P. An examination of the instructions appellant now claims were improper shows that appellant is unable to make that showing.

A. The judge properly advised the jury on the elements of Robbery.

The judge's instructions on the elements of the crime of robbery were clear and specific. He advised the jury:

> In order for you to find this defendant guilty of robbery, you must find that the government has proven beyond a reasonable doubt the following elements:
>
> 1. That the defendant took something of value from the complainant.
>
> 2. That he took it unlawfully and with the intent to convert it permanently to his own purpose.
>
> 3. That he took it from the complainant's person or immediate actual possession.
>
> 4. That he took it by force or violence, against resistance or by sudden or stealthy seizure or snatching, or by putting the complainant in fear.
>
> Now, as to the first essential element enumerated, namely, that he took something of value, the actual value of the thing taken is of no consequence as long as it has some value.
>
> If you should find that the defendant took any one of the items described in the indictment, that is sufficient to satisfy that element.
>
> As to the second element enumerated, that he took the property unlawfully and with the intent to convert it permanently to his own use, intent ordinarily cannot be proved

directly because there is no way of fathoming and scrutinizing the operations of the human mind, but intent may be deduced from circumstances and from things done and from things said and a person is presumed to intend the natural and probable consequences of his act.

As to the third element, that he took it from the complainant's person or immediate actual possession, you have heard the evidence and no further explanation is needed.

As to the fourth element, that the defendant took the property by force or violence, against resistance, no further definition is necessary. It will be for you to determine whether the government has proven this element, also. (J.A. 27-28).

Appellant's complaint that the judge should have further defined the element of a "taking from the complainant's person or immediate actual possession" is frivolous. The language has a plain meaning, so no special definition was called for. Cf. Wheeler v. United States, 89 U.S. App. D.C. 143, 190 F.2d 663 (1951). There was no special theory of the case calling for a special definition of "taking". The complainant testified that appellant yoked her, wrestled her to the ground, struggled with her, and then ran off with her purse (J.A. 2-4). Appellant simply denied the offense (Tr. 70) Appellant's theory that "taking" needed further definition appears to be based on the erroneous assumption that the evidence of taking was weak. The following excerpts from the record show the contrary:

Q. Did you have your keys out?

A. Yes, sir, I had my keys in my hand and my pocket book. (J.A. 3)

* * *

Q. Did you have a purse with you?

A. A black patent leather, yes, sir. (J.A. 4)

* * *

Q. Where was your purse?

A. He had it and was gone. He was running up the hill. (J.A. 4)

Appellant concedes that "If in fact there had been a taking, there was no very serious question as to whether such taking was from the possession of Mrs. Davis or that such taking was by force and violence" (Br. 14). Thus it is clear that the jury was properly advised as to the element of "taking" in the crime of robbery.

Appellant also complains that the judge's discussion of the intent element of the crime of robbery was improper, wherein the judge told the jury:

> As to the second element enumerated, that he took the property unlawfully and with the intent to convert it permanently to his own use, intent ordinarily cannot be proved directly because there is no way of fathoming and scrutinizing the operations of the human mind, but intent may be deduced from circumstances and from things done and from things said and a person is presumed to intend the natural and probable consequences of his act. (J.A. 27-28).

A nigh identical instruction was alleged to be erroneous in Hines v. United States, D.C. Cir. No. 18,260, affirmed by order dated March 9, 1964. That case controls here. The last clause of the instruction, "a person is presumed to intend the natural and probable consequences of his act", is a correct statement of the law. See United States v. Green, 246 F.2d 155, 159 (7th Cir. 1957), cert. denied, 355 U.S. 871; Lantis v. United States, 185 F.2d 91, 93 (9th Cir. 1950); Myres v. United States, 174 F.2d 329, 334 (8th Cir. 1949), cert. denied, 338 U.S. 849 (1949). In the context of the whole instruction the jury understood that the Government had to show not only that there was a taking, of the purse, but also that appellant intended to convert the purse to his own use.

Appellant's reliance on Morisette v. United States, 342 U.S. 246 (1952), is misplaced. In Morisette, the defendant professed an innocent intent, and the judge instructed that a person intends the natural and probable consequences of his act, and gave no consideration to that legitimate defense. 342 U.S. at 273, 276. Appellant here denied the crime altogether (Tr. 70), instead of admitting the act while denying evil intent. In view of the Government's evidence that appellant committed a robbery by force and violence, the instruction to the effect that the intent could be inferred from what was done, and that a person intends the natural and probable consequences of what he does was correct. Cf. Imholte v. United States, 226 F.2d 585, 590 (8th Cir. 1955).

B. Appellant was not entitled to an instruction on petit larceny.

There was no evidence to support a petit larceny instruction in this case. Appellant did not request such an instruction. The Government's evidence showed that appellant yoked the complainant, wrestled her to the ground, struggled with her, and finally ran off with her purse (J.A. 2-4). Appellant denied being present (Tr. 70). The jury would have had to speculate outside the proven facts to find appellant guilty of larceny. Therefore, the judge correctly did not give an instruction on that offense. Burcham v. United States, 82 U.S. App. D.C. 283, 284, 163 F.2d 761, 762 (1947); Sperf v. Hansen, 156 U.S. 51, 63 (1895); Goodall v. United States, 86 U.S. App. D.C. 148, 151, 180 F.2d 397, 400 (1950); See Cohen v. United States, 297 F.2d 760, 766 (9th Cir. 1962); Mahoney v. United States, D.C. Cir. No. 18005, affirmed by order dated February 26, 1964.

CONCLUSION

Wherefore, it is respectfully requested that the judgment of the District Court be affirmed.

/s/ DAVID C. ACHESON
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/s/ FRANK Q. NEBEKER
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing mimeographed brief for appellee has been mailed to attorney for appellant, De Long Harris, Esq., 1901 11th Street, N.W., Washington, D.C., 20001, this 28th day of May, 1964.

/s/ MAX FRESCOLN
MAX FRESCOLN
Assistant United States Attorney

BRIEF FOR APPELLEE

United States Court of Appeals
For the District of Columbia Circuit

No. 18,443

ODELL PARHAM, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
BARRY SIDMAN
MAX FRESCOLN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In a robbery case where the complainant testified that appellant yoked her, wrestled her to the ground, struggled with her, and finally ran off with her purse, and where appellant testified he was not present, and where appellant had no objection to the judge's charge to the jury and requested no additional instructions:

1. Was it error for the judge in his instructions not to amplify the meaning of the elements of robbery that there must be a taking of property from a person, and that the taking must be by force and violence?

2. Did not the judge properly instruct the jury to the effect that the Government must prove that appellant took the property with intent to convert it permanently to his own use, and to the effect that in determining what intent appellant had, the jury could consider the circumstances and the things done and said, for a person is presumed to intend the natural and probable consequences of his act?

3. Did not the judge properly give no instruction on petit larceny?

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* Cases chiefly relied upon are marked by asterisks.

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For the District of Columbia Circuit

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

An indictment filed August 19, 1963, charged appellant with robbery (22 D.C.C. 2901) (J.A. 1). A jury convicted appellant on December 2, 1963. By Judgment and Commitment filed January 10, 1964, appellant received a sentence of imprisonment for two to six years (J.A. 29). This appeal followed.

Margaret L. Davis testified that about 11:15 on the evening of July 16, 1963, when she was returning home from work, appellant yoked her, wrestled her to the ground, pulled at her underclothes, and finally ran off with her purse (J.A. 2-4). When Miss Davis, who lived at 1824 Savannah Street, S.E., had been parking her car near her apartment building, she saw appellant get out of that car (J.A. 2, 6). She testified:

> • • • when I got out, this man got out of his car and I looked back to see where he was going, you know. It was late and he came towards me and like he didn't

> know where he was going, and I turned around—I turned right to go into the building where I live and he turned with me; and I usually run up the bank, but when I saw him walking up the bank, I walked on the sidewalk; and then he was walking slow and he got in front of me a couple of times, and the last time he got in front of me. He acted like he didn't know which building he was going into. There was three buildings over there, the one I live in and 1820 and 18—I don't know what the number of that is but I think it is 1822—and so he crossed. I crossed over, passed him from behind, and then he yoked me from the back as I was going into the building where I live. (J.A. 2-3).

At the time, Miss Davis had her keys and her pocketbook in her hand (J.A. 3). The light at the door was on (J.A. 8). Appellant wrestled Miss Davis to the ground and struggled with her underclothes with a free hand (J.A. 3). Appellant was choking Miss Davis, so she could not cry out. (J.A. 4, 7). Miss Davis hit appellant "in the private" (J.A. 4). Appellant jumped up, took Miss Davis's black patent leather purse containing approximately $25 and ran up the hill (J.A. 4, 5).

Miss Davis ran and checked the tag number on the car she had seen appellant get out of. It was JX-131. Miss Davis was yelling then, and a special policeman came and let her into her apartment, because she had dropped her keys. (J.A. 4). Miss Davis positively identified appellant as the man who robbed her (J.A. 5). When asked on cross-examination whether she saw the man's face, she said:

> I had seen him all the way across the parking lot. I had been watching him because he acted like he didn't know where he is going. My sister told me to be careful late at night, and I didn't want the man to get too close to me. (J.A. 9.)[1]

Detective Frank Rinaldo of the 11th Precinct testified that on responding to a call to Miss Davis's address, he found her house keys on the lawn (J.A. 10). Miss Davis

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[1] Miss Davis did not testify she never clearly saw her assailant prior to the attack, or that she viewed him during the attack in semi-darkness as appellant states (Br. 3). See J.A. 8-9.

gave him the license number of the car appellant had got out of. The officer determined that the car was listed to appellant. (J.A. 11.) Then Miss Davis accompanied Detective Rinaldo to appellant's address where she identified appellant to the officer as the man "she had the incident with" (J.A. 13).

Judge Keech's charge to the jury is set forth completely at J.A. 23-29. Appellant said he had nothing to add (J.A. 29).

STATUTE AND RULE INVOLVED

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty or robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Rule 30, Federal Rules of Criminal Procedure, provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections. Opportunity shall be given to make the objection out of the hearing of the jury.

SUMMARY OF ARGUMENT

Appellant made no objection to the instructions at trial, and he is unable now to make the necessary showing that there was basic and highly prejudicial error in them. The record shows that there was no necessity for a definition of

"taking" as one of the elements of the offense of robbery. The instructions read as a whole show that the jury was clearly advised that they had to find that appellant had intent to convert the property taken to his own purpose. There was no evidence to support a petit larceny instruction in this case, so the judge correctly did not give such an instruction.

ARGUMENT

The Judge's Instructions to the Jury Were Proper.

Appellant made no objection to the instructions at trial. Thus to obtain a reversal of his conviction he has to show that whatever flaws the instructions allegedly had constituted basic and highly prejudicial error. *Willis* v. *United States*, 106 U.S. App. D.C. 211, 213, 271 F. 2d 477, 479 (1959), *cert. denied*, 362 U.S. 964; *Obery* v. *United States*, 95 U.S. App. D.C. 28, 217 F. 2d 860 (1954), *cert. denied*, 349 U.S. 923; Rule 30, Fed. R. Crim. P. An examination of the instructions appellant now claims were improper shows that appellant is unable to make that showing.

A. The judge properly advised the jury on the elements of robbery.

The judge's instructions on the elements of the crime of robbery were clear and specific. He advised the jury:

> In order for you to find this defendant guilty of robbery, you must find that the government has proven beyond a reasonable doubt the following elements:
>
> 1. That the defendant took something of value from the complainant.
>
> 2. That he took it unlawfully and with the intent to convert it permanently to his own purpose.
>
> 3. That he took it from the complainant's person or immediate actual possession.
>
> 4. That he took it by force or violence, against resistance or by sudden or stealthy seizure or snatching, or by putting the complainant in fear.
>
> Now, as to the first essential element enumerated, namely, that he took something of value, the actual

value of the thing taken is of no consequence as long as it has some value.

If you should find that the defendant took any one of the items described in the indictment, that is sufficient to satisfy that element.

As to the second element enumerated, that he took the property unlawfully and with the intent to convert it permanently to his own use, intent ordinarily cannot be proved directly because there is no way of fathoming and scrutinizing the operations of the human mind, but intent may be deduced from circumstances and from things done and from things said and a person is presumed to intend the natural and probable consequences of his act.

As to the third element, that he took it from the complainant's person or immediate actual possession, you have heard the evidence and no further explanation is needed.

As to the fourth element, that the defendant took the property by force or violence, against resistance, no further definition is necessary. It will be for you to determine whether the government has proven this element, also. (J.A. 27-28).

Appellant's complaint that the judge should have further defined the element of a "taking from the complainant's person or immediate actual possession" is frivolous. The language has a plain meaning, so no special definition was called for. *Cf. Wheeler* v. *United States*, 89 U.S. App. D.C. 143, 190 F. 2d 663 (1951). There was no special theory of the case calling for a special definition of "taking". The complainant testified that appellant yoked her, wrestled her to the ground, struggled with her, and then ran off with her purse (J.A. 2-4). Appellant simply denied the offense (Tr. 70). Appellant's theory that "taking" needed further definition appears to be based on the erroneous assumption that the evidence of taking was weak. The following excerpts from the record show the contrary:

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Q. Did you have a purse with you?
A. A black patent leather, yes, sir. (J.A. 4).

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Q. Where was your purse?
A. He had it and was gone. He was running up the hill. (J.A. 4).

Appellant concedes that "If in fact there had been a *taking*, there was no very serious question as to whether such taking was from the possession of Miss Davis or that such taking was by force and violence" (Br. 14). Thus it is clear that the jury was properly advised as to the element of "taking" in the crime of robbery.

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Appellant's reliance on *Morissette* v. *United States,* 342 U.S. 246 (1952), is misplaced. In *Morissette,* the defendant professed an innocent intent, and the judge instructed that a person intends the natural and probable consequences of his act, and gave no consideration to that legitimate defense. 342 U.S. at 273, 276. Appellant here denied the crime altogether (Tr. 70), instead of admitting the act while denying evil intent. In view of the Government's evidence that appellant committed a robbery by force and violence, the instruction to the effect that the intent could be inferred from what was done, and that a person intends the natural and probable consequences of what he does was correct. *Cf. Imholte* v. *United States,* 226 F. 2d 585, 590 (8th Cir. 1955).

B. Appellant was not entitled to an instruction on petit larceny.

There was no evidence to support a petit larceny instruction in this case. Appellant did not request such an instruction. The Government's evidence showed that appellant yoked the complainant, wrestled her to the ground, struggled with her, and finally ran off with her purse (J.A. 2-4). Appellant denied being present (Tr. 70). The jury would have had to speculate outside the proven facts to find appellant guilty of larceny. Therefore, the judge correctly did not give an instruction on that offense. *Burcham* v. *United States,* 82 U.S. App. D.C. 283, 284, 163 F. 2d 761, 762 (1947); *Sparf & Hansen* v. *United States,* 156 U.S. 51, 63 (1895); *Goodall* v. *United States,* 86 U.S. App. D.C. 148, 151, 180 F. 2d 397, 400 (1950); See *Cohen* v. *United States,* 297 F. 2d 760, 766 (9th Cir. 1962); *Mahoney* v. *United States,* D.C. Cir. No. 18005, affirmed by order dated February 26, 1964.

CONCLUSION

Wherefore, it is respectfully requested that the judgment of the District Court be affirmed.

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